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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 368

RISS & COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM.

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT.

Statement.

This is a direct appeal from the final decree of a specially constituted district court of three judges entered on June 23, 1943, dismissing the appellant's complaint. The appeal was allowed on August 13, 1943, and the United States filed a Motion to Affirm, and served a copy thereof on plaintiff-appellant, on August 31, 1943.

The appellant is a motor carrier which purchased certain permits and certificates of Sooner Distributing Company, Inc., a bankrupt. At the time of the sale Sooner, hereinafter referred to as the applicant, was an applicant for a certificate of public convenience and necessity under

the so-called "grandfather" clause of the Motor Carrier Act (49 U. S. C. 306). A hearing had been held on this application, but before a determination was made by the Commission, financial difficulties supervened and certain protestants filed petitions with the Interstate Commerce Commission setting forth the financial difficulties of the applicant requesting a further hearing be held with respect to such matters.

The Interstate Commerce Commission found the following facts which are binding upon both the plaintiff-appellant and the defendants-appellees, as no evidence was offered at the trial. The facts are found in 22 M. C. C. 542 to 544 inclusive:

> "On May 12, 1937, 5 days after the conclusion of the earlier hearing, applicant filed a petition with the United States District Court in and for the Northern District of Oklahoma, stating that a "good number" of its motor vehicles had been attached at Springfield and St. Louis, Mo., by reason of its inability to pay certain employees' salaries but alleging its solvency and praying that it be temporarily continued in possession of its property pending reorganization under the terms of section 77B of the Federal Bankruptcy Act. The court issued an order on the same date, May 12, 1937, approving the petition and requiring that all property previously attached be returned to applicant. The order further provided that applicant be continued in possession of its property, under the direction of its general manager, and that it continue to operate its business pending a hearing before the court of June 2, 1937.
>
> "On June 3, 1937, the court issued an order appointing two cotrustees to take possession of the debtor's estate, to continue to operate it under the jurisdiction of the court, and to submit to the court within 30 days a plan of reorganization.
>
> "Thereafter, on June 21, 1937, the cotrustees petitioned the court stating (1) that the business was

being conducted at a loss; (2) that the debtor was bankrupt; (3) that no plan of reorganization had been submitted and that it was improbable that any such plan acceptable to interested parties could be offered; and (4) that there was no chance of raising sufficient working capital to permit debtor to operate with any reasonable hope for success in its business. The petition prayed for an order liquidating the debtor's estate.

"On June 29, 1937, the court issued an order adjudging debtor to be a bankrupt, referring the matter to a referee in bankruptcy, ordering the discontinuance of the business forthwith, and requiring the assembling of all movable property by the trustees.

* * * * * * *

"On July 8, 1937, the cotrustees made application to the referee in bankruptcy for an order setting a date of the sale of certain certificates and permits issued by various State authorities to applicant "and any other such certificates or permits under control of the bankrupt, if any". That application urged prompt action so that the value of such rights should not be "materially reduced or lost" by "cancellation of the issuing authorities". The referee in bankruptcy thereupon issued an order setting the date of sale as July 16, 1937. The highest bid received on that date for such rights of applicant was $10,000, which was offered by another motor carrier, "conditioned that the transfer of said permits and certificates should be approved by jurisdictional bodies controlling the same * * * or if at a later date the jurisdictional bodies having control of the approval of the transfer of said permits and certificates failed to approve the transfer of any part of said permits and certificates that a refund would be made to the said bidder on a mileage basis". This bid, upon recommendation of the trustees and protests of the principal creditors, was rejected by the referee and further competitive bids, by three motor carriers, were offered in open court, the highest of

which was $17,500 offered by Riss, intervener herein. This bid was accepted after the court "fully advised all bidders as well as the Riss & Company, Inc., that said bid was being accepted unconditionally and for cash," and such rights as the bankrupt estate had in such property were conveyed to Riss on July 20, 1937, "without any guarantee, restriction or reservation as to the validity of the transferability," of such rights. The $17,500 was paid by Riss and has been distributed with other assets to the creditors of the bankrupt.

"Application was filed with this Commission on September 16, 1937, by Riss seeking approval under section 213 of the act of the purchase of any interstate operating rights to which applicant may be entitled. No. MC-F-422, Riss & Co., Inc.-Purchase-Sooner Distributing Company, Inc. (E. J. Bowers and Chas. E. DeVaux, Cotrustees). Action thereon has been withheld pending a final determination of the issues in this proceeding, and no operations based upon the transfer have been conducted by Riss."

The Commission denied the application on the authority of the so-called *Gregg* case (Gregg Cartage and Storage Company, 21 MCC 17; affirmed 316 U. S. 74). The plaintiff-appellant thereupon instituted an action in the District Court of the United States for the Northern District of Oklahoma assailing the determination of the Commission. The case was disposed of after argument by dismissing the complaint upon the ground that the case was indistinguishable from the *Gregg* case either upon the facts or upon the law.

I.

As the Government has stated in its Motion to Affirm, the basic question involved here is whether or not the decision in the so-called *Gregg* case governs the disposition of this case. In its broader aspects, however, the case involves the question of whether or not every instance where a motor carrier which is an applicant under the "grand-

father'' clause of the Motor Carrier Act becomes involved in financial difficulties followed by an interruption of service is to be denied the granting of the application on the ground that the interruption of service was within the control of the motor carrier.

A review of the decision of the Interstate Commerce Commission since its own decision in the *Gregg* case, 21 MCC 17, and the decision by this court of the same case, 316 U. S. 86, will disclose that the Commission has used the so-called Gregg principle as an easy method of disposing of ''grandfather'' applications and of destroying the rights of many carriers.

Upon the narrow issues involved in this case, however, the plaintiff-appellant submits that there is sufficient difference in the facts obtaining in the *Gregg* case and the instant case to require a finding that the Gregg principle does not apply. In the *Gregg* case the interruption of service took place before the adjudication in bankruptcy. A receiver had been appointed by a state court and his sole activity with respect to the operations of the business had consisted in disposing of the business on hand. He neither solicited nor accepted any new business. Thus, when the bankruptcy court acquired jurisdiction, it found the business at a standstill and since no application for authority to continue the business was sought or granted, the Commission and this court found that the interruption because of bankruptcy was one of which it could not be said that the applicant ''had no control over.''

In the instant case, however, the bankruptcy court under authority of Section 77B of the Bankruptcy Act had appointed trustees to continue the business under the direction of the court, and operations were continued up to the time of the adjudication of bankruptcy. When that adjudication took place, the court, and not the trustees nor the applicant itself, brought about the interruption of service. The court

in entering its order of adjudication ordered the discontinuance of the business and the collection of all movable property for the purpose of selling at the earliest possible time. The facts as found by the Commission and as set forth above disclose that the arrangements were made for the sale with reasonable promptness. Since the interruption of service for this short period of time was one which was brought about by the order of the court, it is one which should not be charged to the applicant but to the court.

In the case of *Shawmut Transportation Company* v. *United States*, 49 F. Supp. 41, which is discussed at length in the Motion to Affirm, the court held that the interruption which occurred in that case was attributable not to the bankruptcy of the applicant, but to certain circumstances surrounding the sale which was held under the supervision and authority of the bankruptcy court, and, therefore, the court held that the interruption was attributable to the sale, not the bankruptcy. It is submitted that an interruption brought about by the explicit order of a bankruptcy court which had complete jurisdiction over the matter is solely attributable to the court and not to the hapless applicant which has gone bankrupt.

II.

The decision of the lower court and the contentions of the United States in this case would bring about the automatic application of the so-called Gregg principle to any situation where a motor carrier which was an applicant under the "grandfather" clause had become a bankrupt and had suffered an interruption of service following the bankruptcy. Such a contention argues for the disregard of a principle which this court has announced many times to the effect that the authority of a case is confined to the facts upon which the decision was based. *Sterling* v. *Constantin*, 287 U. S.

378; *White* v. *Aronson*, 302 U. S. 16; *Wright* v. *United States*, 302 U. S. 583.

The adoption of such a theory may, as was said by Mr. Justice Douglas in his dissenting opinion in the *Gregg* case, "alleviate the administrative chore". It certainly is not consistent with the repeated holdings of this court.

III.

The question involved is substantial. Many "grandfather" applications are still pending before the Commission and the question involved, as stated above, is whether or not the Commission is really to investigate the facts of each case or blindly use the authority of the *Gregg* case to dispose of any application where there has been bankruptcy and an interruption of service.

The Motion to Affirm should be denied.

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